

**FILED**

APR 15 2008

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MITCHELL,

Plaintiff,

v.

OAK HARBOR FREIGHT LINES,

Defendants.

No. C 07-4388 CW

ORDER PROVIDING  
NOTICE TO PRO SE  
PLAINTIFF OF  
REQUIREMENTS FOR  
OPPOSING MOTION  
FOR SUMMARY  
JUDGMENT

Defendants have informed the Court of their intention to file a summary judgment motion in this case. If Defendants choose to file the motion, they must do so by serving Plaintiff with a notice of the motion and a copy of the motion, indicating the time of the scheduled hearing on the motion. They must do so at least 35 days before the date of the hearing. Plaintiff's opposition, including any supporting documents, must be filed by 21 days before the date of the hearing. Defendants' reply to Plaintiff's opposition, should they choose to file one, is due 14 days before the hearing.

The Ninth Circuit in Klingele v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988), held that when a defendant in a case involving a pro se plaintiff moves for summary judgment, the district court must inform the plaintiff of his or her rights and

1 obligations under Rule 56 of the Federal Rules of Civil Procedure.  
2 See also Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (*en banc*)  
3 (the Klinge notice must be phrased in understandable language  
4 aimed at apprising plaintiff of rights and obligations under Rule  
5 56).<sup>1</sup>

6 Rule 56 of Federal Rule of Civil Procedure governs summary  
7 judgment motions. A summary judgment motion is a request for an  
8 order of judgment, without a trial, in favor of the party bringing  
9 the motion, Defendants here. In such a motion, the party moving  
10 for summary judgment presents the facts that are not disputed and  
11 argues that these facts entitle it to judgment as a matter of law.  
12 In other words, Defendants will be arguing that there does not need  
13 to be a trial in the case against it because undisputed facts show  
14

15 <sup>1</sup>The advice required by the 9th Circuit in prisoner pro se cases is as  
16 follows:

17 The defendants have made a motion for summary judgment by which they  
18 seek to have your case dismissed. A motion for summary judgment under  
19 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your  
20 case.

21 Rule 56 tells you what you must do in order to oppose a motion for  
22 summary judgment. Generally, summary judgment must be granted when there  
23 is no genuine issue of material fact--that is, if there is no real dispute  
24 about any fact that would affect the result of your case, the party who  
25 asked for summary judgment is entitled to judgment as a matter of law,  
26 which will end your case. When a party you are suing makes a motion for  
27 summary judgment that is properly supported by declarations (or other  
28 sworn testimony), you cannot simply rely on what your complaint says.  
Instead, you must set out specific facts in declarations, depositions,  
answers to interrogatories, or authenticated documents, as provided in  
Rule 56(e), that contradict the facts shown in the defendant's  
declarations and documents and show that there is a genuine issue of  
material fact for trial. If you do not submit your own evidence in  
opposition, summary judgment, if appropriate, may be entered against you.  
If summary judgment is granted, your case will be dismissed and there will  
be no trial.

Rand, 154 F.3d at 963.

1 that they are entitled to a judgment in their favor.

2 The relevant parts of Rule 56 are as follows:

3 (c) Motion and Proceedings Thereon. The motion shall  
4 be served at least 10 days before the time fixed for the  
5 hearing. The adverse party prior to the day of hearing  
6 may serve opposing affidavits. The judgment sought shall  
7 be rendered forthwith if the pleadings, depositions,  
8 answers to interrogatories, and admissions on file,  
9 together with the affidavits, if any, show that there is  
10 no genuine issue as to any material fact and that the  
11 moving party is entitled to a judgment as a matter of law.  
12 A summary judgment, interlocutory in character, may be  
13 rendered on the issue of liability alone although there is  
14 a genuine issue as to the amount of damages.

15 . . . . .

16 (e) Form of Affidavits; Further Testimony; Defense  
17 Required. Supporting and opposing affidavits shall be  
18 made on personal knowledge, shall set forth such facts as  
19 would be admissible in evidence, and shall show  
20 affirmatively that the affiant is competent to testify to  
21 the matters stated therein. Sworn or certified copies of  
22 all papers or parts thereof referred to in an affidavit  
23 shall be attached thereto or served therewith. The court  
24 may permit affidavits to be supplemented or opposed by  
25 depositions, answers to interrogatories, or further  
26 affidavits. When a motion for summary judgment is made  
27 and supported as provided in this rule, an adverse party  
28 may not rest upon the mere allegations or denials of the  
adverse party's pleading, but the adverse party's  
response, by affidavits or as otherwise provided in this  
rule, must set forth specific facts showing that there is  
a genuine issue for trial. If the adverse party does not  
so respond, summary judgment, if appropriate, shall be  
entered against the adverse party.

29 . . . . .

30 (g) Affidavits Made in Bad Faith. Should it appear  
31 to the satisfaction of the court at any time that any of  
32 the affidavits presented pursuant to this rule are  
33 presented in bad faith or solely for the purpose of delay,  
34 the court shall forthwith order the party employing them  
35 to pay to the other party the amount of the reasonable  
36 expenses which the filing of the affidavits caused the  
37 other party to incur, including reasonable attorney's  
38 fees, and any offending party or attorney may be adjudged  
guilty of contempt.

39 Rule 56 (emphasis added).

1 Although the actual text of Rule 56, cited above, controls in  
2 any dispute as to its interpretation, the Court provides the  
3 following brief explanation of Plaintiff's rights and obligations  
4 under the Rule: If Plaintiff does not file an opposition  
5 supported by evidence, the Court may enter summary judgment in  
6 favor of Defendants. If Plaintiff does not contradict the  
7 Defendants' evidence with evidence of his or her own, the Court  
8 might take Defendants' evidence as true and enter judgment against  
9 Plaintiff on his or her claims against Defendants. Under Federal  
10 Rule of Civil Procedure 56(e), the following types of evidence may  
11 be submitted:

- 12 1. Statements made in the complaint if the complaint (a)  
13 was signed under penalty of perjury and (b) shows  
14 personal knowledge (i.e., "first-hand" or "non-hearsay"  
15 knowledge) of the matters stated;
- 16 2. Affidavits or declarations. Any person signing  
17 an affidavit or declaration must have personal knowledge  
18 of the facts stated. At the end of a declaration or  
19 affidavit, the document must state, "I declare under  
20 penalty of perjury that the foregoing is true and  
21 correct," and be signed by the individual who has the  
22 required personal knowledge. Any declarations or  
23 affidavits that are unsigned will not be considered.
- 24 3. Copies of documents so long as they are submitted with  
25 proof that the records are what they purport to be.  
26 Specifically, Plaintiff must declare under penalty of  
27 perjury that the documents are true and correct copies  
28 of the documents, and must specify how the documents  
were obtained; and

1 4. Transcripts of depositions, answers to interrogatories,  
2 or admissions obtained in this proceeding.

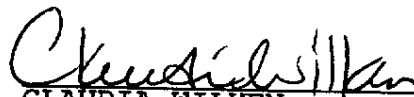
3 To defeat a summary judgment motion, Plaintiff must present  
4 evidence that, when viewed together with Defendants' evidence,  
5 convinces the Court that his or her claims should go to trial.

6 If Plaintiff has a good reason why facts are not available to  
7 him or her at the time required to oppose the summary judgment  
8 motion, the Court may consider a request to postpone ruling on the  
9 motion. To support such a request, Plaintiff must provide the  
10 Court and opposing counsel with an affidavit or declaration  
11 (signed under penalty of perjury) setting forth the reasons the  
12 facts are unavailable and indicating how those facts would support  
13 his or her claims.

14 Plaintiff is reminded that if he or she does not file and  
15 serve a written opposition with supporting documents or a request  
16 to postpone with a supporting affidavit or declaration, the Court  
17 may deem this failure to act to be consent to the granting of  
18 Defendants' summary judgment motion.

19 This notice shall constitute the only such notice from the  
20 Court concerning the Defendants' summary judgment motion. The  
21 Court will not provide any further information regarding the  
22 interpretation of Federal Rule of Civil Procedure 56 and will not  
23 answer unsolicited questions about the applicable rules of  
24 procedure.

25 Dated: APR 1 2008

26   
27 CLAUDIA WILKEN  
28 United States District Judge

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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

MITCHELL et al,

Plaintiff,

v.

OAK HARBOR FREIGHT LINES INC et al,

Defendant.

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Case Number: CV07-04388 CW

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 22, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Willie L. Mitchell  
P.O. Box 5282  
Oakland, CA 94605

Dated: April 22, 2008

Richard W. Wieking, Clerk  
By: Sheilah Cahill, Deputy Clerk